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Valparaiso University

Seegers Lecture

LEGAL REALISMS, OLD AND NEW

Brian Leiter*

"Legal Realism," whatever exactly it is, now has sufficient prestige in many circles that scholars compete to claim the mantle of the "Realist Program," whatever exactly that is. Not all scholars do so, to be sure, but many—from many different jurisdictions and disciplinary backgrounds—claim the mantle, as the international conference last spring on "New Frontiers of Legal Realism" at the University of Copenhagen certainly attested.[1] Scholars from Sweden, Denmark, the United States, Canada, Britain, Romania, France, and South Africa were all there as "legal realists"—or, at least sympathizers with legal realism—and represented disciplinary backgrounds in law, anthropology, psychology, sociology, and philosophy. But what does it mean to be a "legal realist"? What unites the two most famous "old" Legal Realisms—the American and the Scandinavian—with the "new legal realism" invoked, variously, by sociologists, anthropologists, and political scientists, among others?[2] There are, of course, other "legal realisms," old and new, from the "free law" movement in Germany more than a century ago,[3] to the Italian Realism of the Genoa School

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1 *New Frontiers of Legal Realism*, UNIV. OF COPENHAGEN, http://jura.ku.dk/icourts/calendar/new-frontiers-of-legal-realism/ (last visited May 19, 2013).

2 *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61 (2009); *New Legal Realism: Empirical Law and Society*, NEW LEGAL REALISM, http://www.newlegalrealism.org/ (last visited May 19, 2013).

3 *See generally* Gnavius Flavius, *The Battle for Legal Science*, 12 GERMAN L.J. 2005 (2011); Christian Joerges, David M. Trubek & Peer Zumbansen, "*Critical Legal Thought: An American-German Debate": An Introduction at the Occasion of its Republication in the German*

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today.[4] My focus, however, shall be on the old and new Realisms that are probably most familiar. Is there anything they all share?

Let us start with the old, and, in particular, with an issue that should not be taken for granted in this context: namely, whether anything unites the Americans and the Scandinavians. H.L.A. Hart certainly convinced a generation of Anglophone philosophers that "realism" was a united philosophical front against his legal positivism,[5] but it is now common knowledge, I trust, among scholars that Hart misunderstood the American Realists, indeed, even failed to understand that they were, in fact, tacit legal positivists, committed more or less to his view of the nature of law.[6] It was Hart's mistake to construe the American Realists as interested, as he was, in analyzing the "concept of law," that is, the concept implicit in our ordinary talk about "this is what you must do given the court's decision" or "that's impermissible, given the statute passed by the legislature." The American Realists were, by contrast, mostly interested in understanding why courts decide as they do, not what the ordinary person's understanding of law was. To the extent they presupposed views about the nature of law, as I have argued elsewhere,[7] they are views much closer to those of legal positivists who believe that norms only count as legal norms in virtue of having the right kind of social source acknowledged by officials in that legal system (for example, enactment by the legislature).

If Hart's misreading of American Legal Realism is now familiar, it is less common knowledge, at least among Anglophone scholars, that Hart probably did as badly in his representation of the Scandinavian Realists. At a minimum, he was wrong, as far as I can see, to conflate Alf Ross's views with those of Axel Hägerström and Karl Olivecorona—to name the three major Scandinavian legal realists—and he may have even been wrong in his interpretation of Ross as well.[8] My hypothesis, on which I will elaborate shortly, is that American and Scandinavian Realism have almost nothing—not nothing, but almost nothing—in common. That they are both labeled examples of "legal realism" is probably a

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Law Journal 25 Years Later, 12 GERMAN L.J. 1 (2011); Hermann Kantorowicz, *Some Rationalism about Realism*, 43 YALE L.J. 1240 (1934); Herman U. Kantorowicz & Edwin W. Patterson, *Legal Science – A Summary of Its Methodology*, 28 COLUM. L. REV. 679 (1928).

4 *See, e.g.*, Riccardo Guastini, *Rule-Scepticism Restated*, *in* 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 138 (Leslie Green & Brian Leiter eds., 2011).

5 *See generally* H.L.A. HART, THE CONCEPT OF LAW ch. VII (1961).

6 *See* Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278 (2001), *reprinted in* BRIAN LEITER, NATURALIZING JURISPRUDENCE 59 (2007).

7 *See id.*

8 *See generally* 1 ENRICO PATTARO, THE LAW AND THE RIGHT: A REAPPRAISAL OF THE REALITY THAT OUGHT TO BE ch. 8 (2007).

misfortune and an accident of intellectual history. While the Scandinavians appear to have adopted the label "realism" to signal their opposition to metaphysical idealists, who thought the nature of reality was dependent on the human mind and its categories,[9] the Americans invoked the more colloquial sense of "realism" as being candid about what really happens (especially when courts decide cases), without sentimental or moralistic illusions.[10]

That the Scandinavians and Americans should turn out to be so different is hardly surprising if we remember how utterly different in professional background and intellectual interests the Americans and Scandinavians were. The great American Realists—Karl Llewellyn, Jerome Frank, Herman Oliphant, Walter Wheeler Cook, Max Radin, Underhill Moore, Thurman Arnold, William O. Douglas, among others—were law professors and lawyers, with no philosophical training and, rather obviously, no aptitude for or interest in philosophical questions.[11] What they were all interested in, quite clearly, was how courts actually decide cases and what lawyers and law students needed to know if they were to reliably advise their clients about how they would fare in the courts.

The Scandinavians were quite different: they were either primarily philosophers (for example, Hägerström) or had formal training in philosophy, and all were primarily academics and scholars who conceived of their jurisprudential questions in philosophical terms. In contemporary terminology,[12] they were all occupied with variations on what philosophers call the "location problem," that is, the problem of how to locate some phenomenon of interest—consciousness, say, or moral value—in a world naturalistically conceived, that is, conceived in terms that could be articulated nomically or at least causally by the empirical sciences. In other words, how do we make sense of subjective conscious experience, or of the idea that something is morally wrong, in a world that we take to be exhaustively explained by physics, chemistry, and biology? How can we locate the experience of Beethoven, or the

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[9] Hägerström is a case in point. *See, e.g.*, PATTARO, *supra* note 8; *see also* PATRICIA MINDUS, A REAL MIND: THE LIFE AND WORK OF AXEL HÄGERSTRÖM 48 (2009). Mindus notes other writers' skepticism about the lumping together of Scandinavian and American Realism. *Id.* at 137 n.2.

[10] *See, e.g.*, Brian Leiter, *In Praise of Realism (and Against "Nonsense" Jurisprudence)*, 100 GEO. L.J. 865 (2012).

[11] Felix Cohen is the exception, although his philosophy PhD served him badly. *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (arguably adopting an indefensible version of rule-skepticism). For discussion, see LEITER, *supra* note 6, at 68–73.

[12] *See, e.g.*, FRANK JACKSON, FROM METAPHYSICS TO ETHICS: A DEFENCE OF CONCEPTUAL ANALYSIS (1998).

sense that genocide is a moral abomination, in a world thought to be composed of nothing other than physical, chemical, and biological facts? For the Scandinavian Realists, the precise issue was how to locate a legal system of norms in a world so conceived. None of them were, as far as I can see, attracted to eliminativist solutions to the location problem, of the kind that most naturalistic philosophers would adopt for, say, religious discourse: the entities that religions refer to (gods, spiritual entities, souls, non-physical forms of life) do not exist and so should be eliminated from any realistic picture of what the world is like.

None of the Scandinavians, in short, wanted to draw the conclusion that laws and legal systems and legal norms did not really exist, just because the idea of obligations, duties, and rights did not figure in a natural scientific explanation of the world! Rather, they wanted to find a way of understanding legal norms that was compatible with a semantic, metaphysical, and epistemological picture of the world in which there were no objectively existing values or norms. In other words, if "norms" about obligations, duties, and rights do not actually refer to things that actually exist, how do we understand the meaning of legal rules that refer to such entities? In this regard, H.L.A. Hart has much more in common with Scandinavian Realism than his polemic in chapter seven of *The Concept of Law* would suggest, since he accepted a similarly naturalistic picture of the world.[13] The Scandinavian response to the location problem involved some mixture of non-cognitivism (and—inconsistently at times—verificationism) about the semantics of normative legal judgment,[14] as well as psychologism about norms and normative guidance to deal with the metaphysical and epistemological issues. On the semantic side, judgments about legal obligations and duties were interpreted as expressing certain non-cognitive attitudes or feelings: a court's judgment of the form, "Mr. Smith has a contractual obligation to pay Mr. Jones $5,000 for those widgets," really means something like, "I, the judge, feel very strongly that Mr. Smith should pay Mr. Jones $5,000 for those widgets, and if he doesn't, I will sanction him!" The Scandinavian Realist's psychologism held that legal norms, both their existence and their effects on behavior, were to be explained in terms of the psychological states of persons who accepted these norms, rather than the reality of the norms: that X believes or feels he has a duty

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[13] *See, e.g.*, Kevin Toh, *Hart's Expressivism and His Benthamite Project*, 11 LEGAL THEORY 75 (2005).

[14] *See* Torben Spaak, *Karl Olivecrona's Legal Philosophy: A Critical Appraisal*, 24 RATIO JURIS 156, 163–65 (2011); Torben Spaak, *Karl Olivecrona on Judicial Law-making*, 22 RATIO JURIS 483, 493–94 (2009).

or obligation is what is explanatory of behavior, not the existence of the duty.[15]

A similar kind of psychologism is, I think, implicit in Hart, though he sometimes cannot quite acknowledge it,[16] perhaps because of the influence of J.L. Austin's ordinary language philosophy on his thinking. But it is important to remember that it is central to Hart's view that at the foundation of a legal system—what makes a system of legal norms possible—is just a complicated psychological and sociological artifact, namely, that officials converge on certain criteria of legal validity and believe themselves to have an obligation to apply those criteria.[17] Thus, the answer to the question why, for example, constitutionality is a criterion of legal validity in the United States is, in the end, simply that officials of the system treat it as one and believe (for whatever reason) that they ought to do so. In short, I think the Scandinavians have far more in common with the great Austrian legal positivist Hans Kelsen and the great English legal positivist H.L.A. Hart than they do with the American Realists: the latter want to figure out why courts decide as they do and guide lawyers accordingly; while all the former—that is, Kelsen, Hart, and the Scandinavians—are interested in traditional philosophical questions about the metaphysical nature of law and how it can be located within a naturalistic worldview, that is, one that takes for granted that the world is, more or less, as the sciences describe it. Hart and the Scandinavians differ from Kelsen in their willingness to think the answer can involve "naturalizing" certain normative concepts in law, that is, understanding them as complicated psychological and sociological artifacts, and thus as part of what Kelsen would have understood to be an "impure" theory of law.[18]

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[15] *See, e.g.*, MINDUS, *supra* note 9, at 142 n.31 (noting that scholars in psychology used suggestive effect to explain some problems with the human mind during the time of Hägerström).

[16] *See generally* Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Scepticism*, 32 OXFORD J. LEGAL STUD. 663 (2011).

[17] Scholar Jakob Holtermann's view is that Ross insists on treating even valid primary legal rules as psychological artifacts, and thus denying the idea of derivations of validity from a master rule of recognition, and that he is moved to this extreme position by classical skeptical worries that are not peculiar to law. *See* Jakob v.H. Holtermann, *Hart's Criticism of Ross*, UNIV. OF COPENHAGEN, http://jura.ku.dk/crs/english/calendar/hart-ross/ (last visited May 20, 2013). I cannot comment on whether this is correct as an interpretation of Ross, but it would seem to me to make his position less, rather than more, compelling, depending as it does on skeptical worries of dubious merit and to which there are a multitude of responses with which he was unfamiliar.

[18] I've explored that possibility as well. *See* LEITER, NATURALIZING JURISPRUDENCE, *supra* note 6, at pt. II.

There remains, though, one thin sense in which the Americans and the Scandinavians do share something: namely, they are both skeptical that the legal doctrine the judges invoke in their opinions explains their decisions. Indeed, I shall take this idea—namely, skepticism about the causal efficacy of legal doctrine (the "Skeptical Doctrine" for short)—to be the central thesis of realists in all their many varieties.[19] The Scandinavians, as I understand them, actually hold the more far-reaching version of this doctrine, since their skepticism is directed at the idea that an abstract object like a legal norm or doctrine can figure in an explanation of behavior, without reference to the psychological states of persons (such as their "feeling bound").[20] Thus, their skepticism is not confined to the causal efficacy of legal norms, but to all norms. By contrast, the American Realists, the Italian Realists, the contemporary political scientists who study the judicial process, and many others all subscribe to the more mundane understanding of the Skeptical Doctrine: the rules and principles the judges recite in their opinions do not reveal the real reasons and motives for their decision or reveal them only incompletely.

It is with respect to what I am calling the Skeptical Doctrine that it is often said in the United States that "we are all realists now." The anti-realist reaction of the Legal Process School at Harvard in the 1950s notwithstanding, during most of the post-World War II period in the United States, most legal scholars responded with at least some skepticism to the doctrinal rationales given for decisions in contested cases, especially those that commanded the attention of the appellate courts. The triumph of the Skeptical Doctrine in the United States became clear with the rise of law and economics that began in the 1970s and the short-lived fad of Critical Legal Studies in the 1970s and 1980s. In the 1970s, Richard Posner at the University of Chicago, and then others, argued that one could make much better sense of common law doctrines across a range of fields by understanding them as enacting the logic of economic efficiency—one could thus bypass the "official" doctrine (for example, talk of "duty" in torts) in favor of an economically-informed explanation of the pattern of decisions.[21] In the

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[19] I think Edmund Ursin is correct to argue that in the work of some American Realists, especially Leon Green, there is a strong normative program that goes beyond the Holmesian idea of making reliance on uncodified norms of actual practice explicit in judicial decision-making. *See generally* Edmund Ursin, *Clarifying the Normative Dimension of Legal Realism: The Example of Holmes's* The Path of the Law, 49 SAN DIEGO L. REV. 487 (2012).

[20] *See, e.g.*, MINDUS, *supra* note 9, at 142 (describing Hägerström's view of "the suggestive effect" of legal norms).

[21] *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1972).

1980s, Critical Legal Studies writers tried to argue that the surface doctrine of the private law, in particular, was best understood as reflecting political choices between abstract, but conflicting, political philosophies that were both allegedly implicit in the doctrine.[22]

Both these descriptive/explanatory programs were ultimately failures, though economic analysis remains the dominant form of normative analysis of legal problems in the United States. But the failure to realize their grand descriptive ambitions co-existed with the continued dominance of widespread commitment to the Skeptical Doctrine, and in a form that would have been clearly recognizable to the original American Realists of the 1920s and 1930s. Let me explain.

The American Realists sometimes paid homage to the social sciences, even adopting the rhetoric of the then-dominant behaviorism in psychology (for example, in their talk about the "stimulus" of the facts of the case), but their actual scholarly practice was largely insulated from the social science of the day—the unfortunate exception being Underhill Moore of the Yale Law School, who squandered his days recording the parking habits of New Haven drivers, and to whom we will return shortly.[23] This did not mean that the Realists were not interested in what the courts do; rather, their approach to the facts about what courts do almost entirely eschewed social scientific inquiry, and for good reasons I think.[24] The paradigmatic Realist inquiries of the 1920s, 1930s, and after—Oliphant on the promise-not-to-compete cases,[25] Llewellyn on the New York sales cases,[26] Green on "proximate cause" in tort law,[27] Handler on trademark[28]—consisted in careful scrutiny of the underlying facts of lines of cases, bringing out the gap between the official "doctrinal" explanation for the decision and the actual sotto voce norms of "decency" and the "felt sense" of "the right result on the facts of the case and situation" that seemed to be at work in the judge's thinking.[29]

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22 *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

23 *See* Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1 (1943).

24 Theirs was a "naturalized" theory of adjudication, as I have argued. *See* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997), *reprinted in* NATURALIZING JURISPRUDENCE, *supra* note 6, at 15. But while it took inspiration from the social sciences, its actual methodology was a recognizably lawyerly one.

25 *See generally* Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928).

26 *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 122–24 (1960).

27 *See generally* LEON GREEN, THE JUDICIAL PROCESS IN TORT CASES (2d ed., 1939).

28 *See* Milton Handler & Charles Pickett, *Trade-Marks and Trade Names – An Analysis and Synthesis* (pts. 1 & 2), 30 COLUM. L. REV. 168 (1930), 30 COLUM. L. REV. 759 (1930).

29 LLEWELLYN, *supra* note 26, at 135.

The goal was to discover the non-legal norms that made best sense of the courts' response to recurring "situation-types," i.e., patterns of fact that seemed to elicit the same kind of results. So, in Oliphant's famous example (from an article titled importantly, *A Return to Stare Decisis*), he denied that there was a single, general rule about the enforceability of contractual promises not to compete: rather, courts enforced those promises when made by the seller of a business to the buyer, but found ways not to enforce them when made by a (soon-to-be former) employee to his employer.[30] In the former scenario, Oliphant claimed, the courts were simply doing the economically sensible thing (no one would buy a business if the seller could simply open up shop again and compete); while, in the latter scenario, courts were taking account of the prevailing informal norms governing labor relations at the time, which disfavored such promises, especially given the inequality in bargaining power between employees and employers. A meaningful doctrine of stare decisis could be restored, on this account, by making legal rules more fact-specific, i.e., by tailoring them to the underlying situation-types to which the courts were sensitive.

So, too, Llewellyn noticed a line of New York cases applying the rule that a buyer who formally states his objections to a seller's shipment "must be held to have waived all other objections."[31] Llewellyn noted that the rule seemed fair in those cases where the buyer "ought to have known or did know of the defect he failed to mention" and especially when the buyer's "silence has kept the seller from working a permissible and possible cure of the defective tender, or has led to unwarranted surprise in the litigation."[32] But Llewellyn identified a "curious pile of cases in which courts normally sensitive enough to decency announce and apply the rule in its crassest form," that is, without regard to any of the preceding considerations.[33] Like Oliphant on the promise-not-to-compete cases, Llewellyn also found an underlying difference in the situation-type characteristics of the cases where the rule about formal notice of objections seems harshly applied: namely, that in all those cases the alleged "defect in question does not appear to be the true ground of rejection" but "rather . . . the market has turned sour, and the buyer is seeking a purely legalistic out."[34] In other words, the court, being "sensitive to commerce or to decency," invoked the harsh rule on

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[30] *See generally* Oliphant, *supra* note 25 (discussing legal theory in the context of promise-not-to-compete case law).

[31] LLEWELLYN, *supra* note 26, at 122 (citing Littlejohn v. Shaw, 53 N.E. 810, 811 (1899)).

[32] *Id.* at 122–23.

[33] *Id.* at 123.

[34] *Id.*

rejection in order to frustrate the attempt by buyers to escape contractual obligations that, under changed market conditions, no longer seemed economically attractive to the buyer.[35]

This latter example actually creates a problem for the interesting hypothesis, defended by Professor Alan Schwartz of Yale Law School, that Llewellyn was really a proto-economic efficiency theorist of contract law.[36] Schwartz notices, correctly, that since Llewellyn thinks courts generally treat the informal norms of ordinary mercantile practice as the benchmark for their decisions, it would seem that courts generally treat economically efficient norms as the benchmark—given the plausible assumption that those engaged in a particular trade will gravitate towards economically efficient norms governing their dealings. But the example of the New York sales cases makes clear that Llewellyn thinks there is a limit to the neoclassical economist's interpretation of efficiency in this context: for courts do not look favorably on "economically efficient" breaches, which was precisely what was at issue in those cases. They view such post-hoc attempts to escape economically unfavorable contracts as unfair (even if they are welfare-enhancing in the economist's sense) and so will not permit them. So, contra the economic analysis of contract law, American Realists like Llewellyn notice that courts actually do care about the fairness or unfairness of contractual situation-types, at least sometimes.

The extreme version of the Realist hypothesis that what really explains appellate court decision-making is sensitivity to the underlying "situation-type" presented by the case is perhaps most vivid in Leon Green's 1931 textbook on torts, which was organized not by the traditional doctrinal categories (e.g., negligence, intentional torts, strict liability), but rather by the factual scenarios—the "situation-types"—in which harms occur: e.g., "surgical operations," "traffic and transportation," and the like.[37] The premise of this approach was that there was no general law of torts per se, but rather predictable patterns of torts decisions for each recurring situation-type that courts encounter.

That the preceding examples illustrate the heart of the Realists' "empirical" method explains, of course, why the Realists were so influential in American law: you did not need social science training to do this kind of analysis, you just needed to be a sensitive and skeptical reader of court opinions—something good lawyers are, in fact, good at.

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[35] *Id.* at 124.

[36] *See generally* Alan Schwartz, *Karl Llewellyn and the Origins of Contract Theory*, *in* THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW (Jody S. Kraus & Steven D. Walt eds., 2000).

[37] *See* GREEN, *supra* note 27.

Even my late University of Texas colleague Charles Alan Wright, lead author of the preeminent treatise on American civil procedure, described himself to me as a "legal realist," for he took the task of his great procedure treatise to be the same as Oliphant's approach to the promise-not-to-compete cases: that is, to describe the rules of procedure at a greater level of factual ("situation-type") specificity, a level that would enable lawyers to accurately predict what the courts will do. Another former Texas colleague, Douglas Laycock—now at the University of Virginia—is, among other distinctions, the leading American authority on the law of remedies, though not one who thought of himself as a Legal Realist. Yet his classic debunking of what American courts call "the irreparable injury rule" is a case study in "Realist" analysis, as I eventually persuaded him.[38] The irreparable injury rule states courts will not enjoin misconduct when money damages will suffice to compensate the victim; only when the harm would be "irreperable" will courts issue an injunction, according to the rule.[39] Laycock reviewed more than 1,400 cases and concluded:

> Courts do prevent harm when they can. Judicial opinions recite the rule constantly, but do not apply it. . . . When courts reject plaintiff's choice of remedy, there is always some other reason, and that reason has nothing to do with the irreparable injury rule. . . .
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> . . . .
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> . . . An intuitive sense of justice has led judges to produce sensible results, but there has been no similar pressure to produce sensible explanations.[40]

Like the old realists, Laycock finds a disjunction between the "law in the books" and the "law in action," and, also like the realists, he invokes as an explanation for that disjunction the decision-makers' "intuitive sense of justice."[41] So, too, following in Oliphant's footsteps, Laycock seeks to reformulate and restate the rules governing injunctions to reflect the actual pattern of decisions by the courts following their intuitive sense of justice.

So how did the myth arise that the American Realists were proto-social scientists, forerunners, say, of the political science work on courts championed by Frank Cross, Lee Epstein, Jeffrey Segal, Harold Spaeth,

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38 DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991).

39 *Id.* at vii.

40 *Id.* at vii, ix.

41 *Id.* at ix.

and Emerson Tiller, among many others, or inspirations for the "law and society" interest in qualitative studies of the law "in action"? Without a doubt, both the political scientists and the law-and-society scholars benefitted from the Realist defense of the Skeptical Doctrine: it opened the door to the idea that to understand how the law really works, it is not enough to know legal doctrine. In that sense, these recent developments are "realist" in the sense of depending upon the Skeptical Doctrine. And without a doubt the American Realists share with the social scientists the ambition of making the study and understanding of law "scientific," but they shared that ambition with Christopher Columbus Langdell, inventor of the case method, as well.

Let us remember that the idea that only a *Wissenschaft* (the German word typically translated "science") was a proper object of university study, the idea that arose with the birth of the modern research university in Germany in the early 19th century, was taken for granted by almost everyone in the Anglophone world in the late 19th and early 20th century. The Anglophone word "science," alas, has a connotation of "natural science" that is absent in the German; the original idea of a *Wissenschaft* is simply of a rigorous method or discipline for acquiring knowledge, a method or discipline that when correctly followed secures the reliability of its results. The natural sciences, to be sure, are our preeminent examples of successful *Wissenschaften*, and it was the natural sciences that both Langdell and the American Realists had in mind in their own quest to establish law as a *Wissenschaft*. But, whereas Langdell thought the legal reasoning of the courts, as expressed in their opinions, were the data on which the science of law should be based, the American Realists objected that those opinions were more often post-hoc rationalizations than illuminating about the actual causal explanation for decision. To really understand the decisions, the American Realists noticed, you had to pay attention to the underlying facts of the cases—the "situation-types" as we have seen—and the informal and not fully articulated norms that inform the judge's response to those situation-types. That, for the American Legal Realists, was the essence of a legal *Wissenschaft*. And a smart Realist lawyer could be a practitioner of this *Wissenschaft* without becoming a social scientist with physics envy.

So whence the idea that the American Realists wanted to bring social-scientific methods to the study of law, that they not only opened the theoretical door for such work, but were advocates, proponents, even practitioners of it? This latter myth has two primary sources: first, the unfortunate but cautionary tale of Underhill Moore mentioned already; and, second, the fact that Karl Llewellyn collaborated with an

anthropologist to study the customary practices regulating the social life of the Cheyenne Indians.[42] Let me take these up in turn.

In my own work, I am indebted to the legal historian John Henry Schlegel of the State University of New York at Buffalo for introducing me systematically to Underhill Moore's work in Schlegel's valuable book on *American Legal Realism and Empirical Social Science*.[43] Schlegel adduced the evidence that various American Realists expressed curiosity about the social sciences and talked about how the social scientific study of law might be useful and interesting, and so on, but he found only one real practitioner, namely, Underhill Moore.[44] Moore, alone among his fellow American Realists, took the state-of-the-art of contemporary social science seriously; unfortunately for Moore, the state-of-the-art was Watsonian behaviorism. (B.F. Skinner made the behaviorist doctrine famous, but John Watson was the 'founder' as it were.) The psychological behaviorists thought of themselves as bringing the methods of the natural sciences to bear on human beings, and, since it was central to natural scientific method that sensory experience is the source of all genuine knowledge, the behaviorists thought it imperative to limit themselves to the only aspect of human psychology available to direct observation: namely, what stimuli affect people and what behavior results. (This was itself a caricature of natural-scientific method, but that need not concern us here.) What resulted was one of the great travesties in the history of the human sciences: decades of largely trivial or uninteresting attempts to discover the laws of cause-and-effect governing observable stimuli and behavioral responses of persons, with the actual content of the mind (beliefs, desires, and the rest) taken to be off-limits to scientific psychology. Noam Chomsky initiated the destruction of the behaviorist program starting in the 1950s, and today, of course, the "cognitive" revolution, the idea that what goes

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[42] Thanks to Fred Schauer for pointing out the significance of this aspect of Llewellyn's work to the long-term perception of Realism.

[43] *See generally* JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995).

[44] There was, to be sure, empirical legal research being done in the 1920s and 1930s, but almost none of it was done by scholars who were identified with, or self-identified with, Legal Realism. *See* Herbert M. Kritzer, *The (Nearly) Forgotten Early Empirical Legal Research*, *in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH (Peter Cane & Herbert M. Kritzer eds., 2010). The main exception was Douglas's early work on bankruptcy, which he soon left behind once he joined the Roosevelt Administration. *Id.* at 879, 889. Charles Clark, less a theoretician of Realism but certainly sympathetic, also did (or at least supervised) some empirical work on aspects of the civil justice system. *Id.* at 879, 887. Strikingly, Kritzer makes no mention of Underhill Moore, perhaps for good reason.

on in the mind, even if not directly observable, is central to an adequate psychological theory, predominates.[45]

Alas, poor Underhill Moore, without any independent critical tools in his intellectual arsenal, took the behaviorist research program seriously. Other American Realists were aware of that program, of course, and it showed up in their rhetoric, such as Oliphant's fondness for the rhetoric about the "stimulus" of the facts of the case and the "response" of the judge.[46] But only Moore, among all the American Realists, thought that a properly scientific study of law—"science" being the marker of a mature intellectual discipline, fit for university study, as we have already noted—would actually dispense with talk about what judges believed or thought in explaining court decisions.[47] The endpoint of this trajectory of research was the lead article in the *Yale Law Journal* of 1943 analyzing the parking practices of New Haven drivers when the parking signs changed. Among his discoveries: when the signs changed, not all drivers noticed right away. But giving tickets helped change their parking habits. Such was the state-of-the-art behavioral legal science in the 1940s.[48] Some twenty years later, with Moore's general approach in mind, Llewellyn wrote dismissively in *The Common Law Tradition* that "[a]n appellate judge is not Pavlov's dog."[49]

The failure of Moore's research program should certainly give today's enthusiasts for social-scientific approaches to law pause. Moore had undoubtedly tapped into the dominant research paradigm among psychologists, and he was not, as far as I can tell, an inept practitioner of it. But Moore hitched his wagon to a failed research program, and its

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[45] The behaviorist research program regarding human behavior is not *wholly* defunct, as Jeff Rachlinski points out to me: it is still thought to be illuminating with regard to the behavior of addicts, who no doubt have more in common with pigeons than most people.

[46] *See* Oliphant, *supra* note 25, at 75.

[47] *See generally* Underhill Moore & Theodore S. Hope, Jr., *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L.J. 703 (1929); Underhill Moore & Gilbert Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts – VI. The Decisions, the Institutions, and the Degrees of Deviation*, 40 YALE L.J. 1219 (1931); Underhill Moore, Gilbert Sussman & C. E. Brand, *Legal and Institutional Methods Applied to Orders to Stop Payment of Checks – I. Legal Method*, 42 YALE L.J. 817 (1933); Underhill Moore, Gilbert Sussman & C. E. Brand, *Legal and Institutional Methods Applied to Orders to Stop Payment of Checks – II. Institutional Method*, 42 YALE L. J. 1198 (1933).

[48] Somewhat surprisingly, as Joshua Fischman points out to me, at least two contemporary scholars hold up Moore as prescient. *See* Daniel E. Ho & Donald B. Rubin, *Credible Causal Inference for Empirical Legal Studies*, 7 ANN. REV. L. SOC. SCI. 17 (2011). They suggest that "ridicule" of Moore's approach is "misplaced" since "in the crucial respect of *research design*, Moore's study was pioneering," a forerunner of "'regression discontinuity' design" as a way of exploring the causal effect of laws on behavior. *Id.* at 18–19. Their invocation of Moore, however, seems more for rhetorical effect (they effectively admit his results were not interesting), and they certainly do not endorse his behaviorism.

[49] LLEWELLYN, *supra* note 26, at 268.

application to law was even worse than its application to other aspects of human behavior. Might it not turn out that rational choice models of judicial behavior or social psychological results about the behavior of college students prove similarly unilluminating with the benefit of distance and hindsight? Perhaps so, though at least one has some reason to think the cognitive revolution in psychology, to which all the dominant social-scientific models of human behavior now subscribe, does seem a genuine advance in the study of human behavior.

The crucial point, however, is that Moore was an outlier who, unlike the vast majority of American Realists, did not spend most of his time reading court opinions and disentangling doctrinal rationales from factual situation-types. Much of social-scientific study of judicial behavior that today travels under a "realist" banner is much closer to Moore than most of American Realism, in the sense that it looks for correlations (which it takes to reveal causal relations) between characteristics of the inputs and the outcomes of judicial decisions.

Very far from Moore's behaviorism was Karl Llewellyn, both in his revolutionary work on commercial law and in his famous study of dispute resolution among the Cheyenne Indians, undertaken jointly with the anthropologist E. Adamson Hoebel.[50] For many years, Llewellyn and Hoebel's book was the preeminent example of "field work" in legal anthropology, one that might seem to put the Realist imprimatur on the necessity of social science for understanding law. Yet, a careful reading of the work by anyone familiar with Llewellyn's jurisprudential views belies that impression. The point of the book is, quite clearly, to show that those who resolved disputes among the Cheyene had what Llewellyn later came to call "situation-sense," that is, an ability to perceive the sensible or fair rule both for the case before the court and beyond. In *The Cheyenne Way*, Llewellyn described situation-sense as the "peculiar sureness in the application of felt, living institutional norms, and peculiar adjustment of the felt 'rules' and the treatment of the particular cases to something bigger and more vital than any 'rule' of an individual case,"[51] and also as the "utterly clean juristic intuition, individualized yet moving with singular consistency whither tribal welfare demands that it shall move."[52] The great American jurists, says Llewellyn, did their work "well-nigh as much by intuition as by rational construct and rational development,"[53] and the remarkable achievement

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[50] *See generally* K. N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941).

[51] *Id.* at 328.

[52] *Id.* at 313.

[53] *Id.* at 311.

of the Cheyenne was that they "produced . . . a large percentage of work on a level of which our rarer and greater jurists could be proud," which is all "the more notable because explicit law—i.e., law clothed in rules—was exceedingly rare among them."[54] Yet, the Cheyenne still produced a "highly predictable consistency in their actual handlings of a whole sequence of tough, knotty cases."[55] All of Llewellyn's other work, which involved reading cases and not visiting Native Americans, is meant to vindicate the role of this kind of "situation-sense" in adjudication. So why did Llewellyn turn to anthropological field work here? There is only one reason as far as I can see, and it is stated candidly in the preface: it was the only way, he says, to study "the law-ways among primitive peoples," namely, those who do not record their decisions in written opinions.[56] In other words, the one major venture by a leading American Realist into actual field work about "law in action" was necessitated only by the fact that the so-called "primitive" people he was studying did not have a tradition of written resolution of their disputes! This is an "old Realist" argument for social science in rather special circumstances only.

A "new legal realism," which many scholars now champion, would continue the paradigm of scholarship established by the old legal realists, namely, contrasting what courts say they're doing with what they actually do. "We are all realists now," because this is what so many legal scholars do, including those who know nothing of social science (like Laycock) and don't even self-identify as realists (like Posner in the 1970s). None of this is to deny the value of sound empirical work on law and the legal system. Such work might even illuminate the gap between what the courts say they're doing and what they're actually doing. It is only to say that the newer forms of legal realism, though they presuppose the Skeptical Doctrine of the old legal realism, have rather little to do with the "old legal realism" of the Americans, which had such a significant impact on American law and legal scholarship and essentially nothing to do with that of the Scandinavians, which was concerned, fundamentally, with philosophical questions about where to locate the phenomenon of a system of legal norms in a world naturalistically conceived. It is a testament to the impact of the old Realists that so many newcomers, with little in common and often diverse agendas, want to claim their mantle.

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54 *Id.* at 313.
55 *Id.* at 319.
56 *Id.* at viii.